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IN THE

Supreme Court of the United States

October Term, 1961.

No. 645

JOHN B. KEMMEL.

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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John B. Kemmel, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on November 3, 1961.

OPINIONS BELOW.

The opinion of the District Court for the Middle District of Pennsylvania has not been officially reported, but appears in the Appendix printed for the Court of Appeals, nine copies of which have been filed in this Court. It appears at pages 72a-78a of that Appendix. The opinion of the Court of Appeals (Appendix A, *infra*, p. 23) has not yet been officially reported.

JURISDICTION.

The judgment of the Court of Appeals (Appendix B, *infra*, p. 24) was entered on November 3, 1961. A timely petition for rehearing was denied on December 5, 1961 (Appendix C, *infra*, p. 25). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether there was denial of a fair trial by reason of the reception of prejudicial inadmissible evidence, and by the rulings of the district court.

2. Whether there was sufficient evidence to sustain a conviction of offering to bribe an employee of the United States.

3. Whether the district court erred in its instructions to the jury.

STATUTES AND RULES INVOLVED.

28 U. S. C. § 201 provides in pertinent part:

"§ 201. Offer to officer or other person

"Whoever promises, offers, or gives any money or thing of value, . . . to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency . . . with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned for not more than three years, or both."

Federal Rules of Criminal Procedure:

"Rule 52. Harmless Error and Plain Error

"(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

"(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF THE CASE.

On April 29, 1959 defendant was tried before Honorable John W. Murphy and a jury on an indictment found October 28, 1955, charging him with offering on July 30, 1954 a bribe to two employees of the United States Corps of Engineers, acting in their official function, with intent to induce them to do acts in violation of their lawful duty, in violation of 18 U. S. C. § 201. The jury returned a verdict of guilty, after deliberating for one hour and twenty-two minutes. Defendant filed timely motions in arrest of judgment and for judgment of acquittal or, in the alternative, for a new trial. On October 19, 1960, these motions were denied, and on January 12, 1961, defendant was sentenced to be committed to the custody of the Attorney General for eighteen months. Appeal was timely perfected. The judgment was affirmed by the Court of Appeals, and a petition for rehearing was denied.

The testimony showed that Merritt-Chapman and Scott Corp. had a contract with the United States and the Corps of Engineers of the United States Army for the construction of a Signal Corps Depot at Tobyhanna, Pa. John B. Kemmel, Inc., a corporation of which defendant was the president and principal stockholder, was under a subcontract to the Merritt-Chapman and Scott Corp. to do the painting and finishing at that Depot.

Only three witnesses testified on behalf of the Government. Edward M. Card, who had been Job Superintendent

for Merritt-Chapman and Scott, testified that during the early part of 1954, the contract or specifications called for paint samples to be submitted to the Corps of Engineers for approval (9a).* He testified that some difficulty arose as to the samples submitted, and suggested to defendant that he utilize a different paint which had been approved and used on other warehouses on this job (12a-14a). They ceased painting the warehouse (16a). The paint samples had been certified by the paint manufacturer, Central Paint Company (20a).

John J. O'Donnell, who was Chief Inspector for the Corps of Engineers, testified that it was the duty of the Corps to take samples from unopened paint cans (23a, 38a), but that this was to be done by having the painting subcontractor provide a bottle or quantity of the paint in the presence of a representative of the prime contractor, and in the presence of the materials inspector from the Corps of Engineers (24a, 38a). He also testified that prior to the time that the inspectors took over the job, it had been under the Architect-Engineer, and that when the Corps of Engineers took over, they decided that they would take paint samples (32a) to submit to their District in Philadelphia for testing (31a).

O'Donnell testified that on July 30, 1954, defendant met him with two inspectors, Golden and Guido, and requested them to take new samples (25a). O'Donnell refused to do so unless Colonel Svoboda, O'Donnell's superior, would order it (26a). Later, Svoboda, in the presence of Kemmel ordered O'Donnell to take new samples (27a). Defendant, O'Donnell and Golden went to the paint shop, and O'Donnell started to get a container to take a sample of Central paint. He testified that he heard Kemmel say to Golden,

> "I have got 250 bills here, that is 125 bills apiece." (28a.)

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* References suffixed "a" are to the Appendix filed by petitioner in the Court of Appeals, nine copies of which have been filed in this Court.

O'Donnell testified that Kemmel insisted he take $125, and take and submit the three bottles he had in his car, one of which was Bruder, one Central and one Allied paint. O'Donnell then testified that when they first started to take the samples, he had said to defendant,

> "The hell, you are not going to take samples with a Palm Beach suit on,"

and that was when defendant first suggested that O'Donnell take the samples he had in his car (29a).

O'Donnell further testified that previously he and Inspector Madden had gone to inspect the paint on the job, and that they found only one can of Bruder paint, but approximately 31 of Allied paint (33a-35a). Originally, only Bruder had been used on the job (37a).

Subsequently, they stopped painting the warehouse.

Walter P. Golden testified that on July 30, 1954, in the company of O'Donnell and Inspector Guido, Kemmel asked them to take new samples. He testified that at this time O'Donnell commented about Kemmel taking samples while wearing a Sunday suit, and that O'Donnell said that he would not take any samples without the instruction of Colonel Svoboda (41a-42a). Later, on learning of Svoboda's instructions to take new samples, he met O'Donnell at the paint shop. According to Golden, while O'Donnell was in the shanty, Kemmel told Golden,

> "I have 250 bills if you will accept my samples,"

and that he had three samples in the car. Golden testified that he chastised defendant about trying to bribe them, and that they then proceeded to take the samples, after which defendant left. Later, Golden reported this conversation to Colonel Svoboda (42a-43a).

Colonel Svoboda was not called as a witness, although according to the testimony he was still in the Service, in the Philippines; nor was Inspector Guido called, even though his absence was not explained.

REASONS FOR GRANTING THE WRIT.

Petitioner contends that the trial court committed numerous errors in the charge and in the admission of evidence, including: improper admission of hearsay statements as "verbal facts"; failure to define "verbal facts"; failure to strike prejudicial testimony; removal from the jury of the necessity of finding some of the essential elements of the crime charged; submission of the case to the jury on the wrong theory; a conflict in the evidence, compounded by a confusion in the charge on the principal issue of the case—namely, the type of paint used on the job; failure to instruct the jury as to the necessity for finding some of the essential elements of the crime charged; and an incorrect definition of terms in the indictment, permitting the jury to find defendant guilty of violating the statute in a manner not charged in the indictment. In its brief and oral argument government counsel, who had been trial counsel, did not attempt to justify these alleged errors, but merely argued that objections had not been timely made. The Court of Appeals did not find that there were *no errors* —but only that there had been "no *substantial prejudicial error.*"

Rule 52(b) of the Federal Rules of Criminal Procedure provides that plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. Even Rule 52(a), providing that errors and defects which do not affect substantial rights shall be disregarded, and Rule 30, providing that no party may assign as error any portion of the charge or motion therefrom unless he objects thereto before the jury retires to consider its verdict, do not prevent this Court from correcting errors to prevent manifest injustice. In a decision of the Court of Appeals published after argument in the case at bar, Chief Judge Biggs discussed the policy behind Rule 30, which is equally applicable to Rule 52, pointing out:

"Rule 30 embodies a well recognized principle of sound judicial administration, viz., that no party ought to be allowed to assign as error on appeal a ruling by a trial judge that might have been corrected in the first instance had a timely objection been made. The rule encourages counsel to call the possibility of prejudicial error to a trial court's attention before the error irreparably taints the litigation. United States v. Lang, 3 Cir., 1956, 239 F. 2d 676. It must be recognized that this rule although sound and fundamental is grounded solely on pragmatic considerations of juridical economy and convenience. It is designed to serve a well defined procedural purpose. Such a rule should not be employed woodenly, but should be applied where its application will serve the ends for which it was designed. If it be applied blindly and without the benefit of analysis of particular fact situations before individual courts in specific cases it will be transformed from a sound principle of judicial administration into a trap for the unwary, a trap reminiscent of the senseless technicalities that characterized common law procedural systems and which made them a source of scorn and anger to many lawyers and to most laymen." *United States v. Currens*, 290 F. 2d 751, 759 (3rd Cir. 1961).

And in *Barry v. United States*, 287 F. 2d 340, 341 (D. C. Cir. 1961), the Court of Appeals for the District of Columbia noted:

> "But the responsibility of instructing the jury upon the essential elements of a crime rests upon the court. Failure to meet this special responsibility of the court itself need not be overlooked by an appellate court because overlooked by counsel."

In the case at bar, the trial court failed to instruct on all of the essential elements of the crime. At any rate, it is respectfully submitted that even if each of the alleged

errors was not itself sufficiently prejudicial to justify the granting of a new trial, all of them taken together *were* substantially prejudicial. This is borne out by the fact that even though the trial lasted only a few hours and only three witnesess testified for the Government and none for the defendant, the jury took one hour and twenty-two minutes to return a verdict. [The jury retired at 3:50 P. M. (62a) and returned at 5:12 P. M. (64a).]

This was not a long, complicated trial involving great expense to the Government; principles of fundamental fairness and justice clearly outweigh any expense or inconvenience of a new trial. In light of the jury's obvious doubt as to defendant's guilt, evidenced by its delay in returning a verdict, plus the severity of the sentence, this Court should grant a hearing so that it can carefully consider the cumulative prejudicial effect of all of the alleged trial errors.

In addition, a careful search of the record shows that the indictment failed to disclose, the evidence failed to prove, and the judge failed to define in his charge to the jury, the legal duties which defendant allegedly sought to have violated by offering a bribe. And in its opinion refusing motions for acquittal or new trial, the District Court ascribed to the government officers duties not specified in the indictment nor supported by the evidence. The Court of Appeals did not express any opinion as to the sufficiency of proof or validity of indictment. The interests of fairness and justice thus require that the Court grant the petition for writ of certiorari.

1. The Defendant Was Deprived of a Fair Trial by Reason of the Reception of Highly Prejudicial Hearsay and Irrelevant Evidence, and the Manner in Which the Same Was Treated by the District Court.

In the course of the trial, a number of objections were made to statements by witnesses which were not of their own knowledge or were hearsay and irrelevant as well. On at least two occasions objections thereto were overruled on the

ground that the testimony constituted what the district court denominated "verbal facts", without further clarification.

Thus, in the course of his testimony the witness Card said that certain samples of paint which had been allegedly used by the defendant had been rejected, of which Card had received notice from the Corps of Engineers. The district judge overruled objection to this testimony on the ground that it was a "verbal fact" (12a). With respect to this testimony, it should be noted that no dates were given, but it would appear that Mr. Card was testifying to events which occurred in late April or early May of 1954, some three or four months prior to the events surrounding the alleged bribe recited in the indictment (16a). No attempt was made by the government to show the relationship of the events testified to by Card with the period immediately concerned in the indictment. Indeed, it would appear that whatever the situation was in April or May, it must have been cleared up, because O'Donnell testified to a different stoppage of work in the middle of July, 1954 (36a).

Again, the witness was permitted to testify in detail, over objection, as to a report he had made to the Colonel. The report itself, it will be demonstrated, was highly prejudicial, but the district court permitted the testimony to stand for the most part on the ground that it constituted a "verbal fact" (35a).

The term "verbal fact", we assume, was used by the district court to refer to testimony which would be inadmissible as hearsay or as not of the witness' personal knowledge, but offered as relevant regardless of its truth or falsity. In the instances here related, such relevance could only exist to explain the conduct of the witness called for by the information. The rule is that the witness may testify that acting upon information, he did certain things, but he may not go further and testify as to precisely what he was told. *Smith v. United States*, 105 F. 2d 778 (D. C. Cir. 1959).

Moreover, this use of the term "verbal fact" to the jury was *a fortiori* misleading. Lawyers and judges may be expected to appreciate that the reference is to a legal function. Jurors can only be expected to interpret the ruling according to its literal wording, that is, that the testimony was admitted for their consideration generally, and that it was the judge's determination that the witness had related *facts*, albeit the information was derived from another orally.

It is respectfully submitted that the rulings were erroneous, and prejudicially so from the nature of the testimony. In any event, the district court admitted more than the rule, appropriately applied, would permit, and it committed fundamental error in the manner in which it ruled, without any explanation to the jury of the meaning of "verbal fact", and without limiting the application of the testimony.

This Court's attention is respectfully invited to the testimony of the witness O'Donnell appearing at pages 32a-35a of the defendant's appendix, and especially to that appearing on pages 33a-34a. This testimony incorporates hearsay with the irrelevant. It relates an event into which the witness has incorporated his interpretations and conclusions. But more important, it casts over the entire case a prejudicial suggestion of furtiveness, stealth, and substitution which could not do otherwise than affect the mind of the jury.

The defendant's motion to strike was warranted and appropriate. The court first chose to remonstrate with counsel. On renewal of the motion, the court denied it, but referring to that portion of the testimony "about Sammy running with the cans", said that it is stricken. Apparently, the remainder was admitted as "verbal fact."

It is respectfully submitted that it was prejudicial error to permit this testimony to stand. It is further submitted that it was fundamental error for the court to fail to instruct the jury at any time with respect to the effect of its ruling striking some of the testimony and admitting other

testimony as "verbal fact", for such testimony, contrary to rule of law, could not be utilized by the jury as proof of truth of the matter asserted. Additionally, the jury was never specifically instructed to disregard the testimony ordered stricken.

In these circumstances, the defendant has been deprived of a fair trial, and the motion for a new trial should have been granted.

2. There Was No Sufficient Proof of the Legal Duties of O'Donnell and Golden as to Which the Defendant Is Alleged to Have Attempted to Bribe Them to Violate.

As stated by (Chief) Judge Biggs, specially designated to the Ninth Circuit, in *Schneider v. United States*, 192 F. 2d 498 (1951), at page 500:

> "The statute [18 U. S. C. Sec. 201] itself and the cases construing it or its predecessor make it clear that no violation of the law can take place unless the individual bribed or attempted to be bribed is an officer or employee or person acting for or on behalf of the United States or a department or agency thereof, and that the bribe or the offer is in connection with his line of duty. The duties of him to whom the offer is made or the bribe given are most pertinent. But we are of the opinion that the description is adequate and sufficient under the ruling of this court . . ."

In the case at bar, a glance at the indictment is sufficient to reveal that the legal duties which the alleged attempted bribe sought to have violated do not appear. The indictment is inadequate. *Boykin v. United States*, 11 F. 2d 484 (5th Cir. 1926); see *United States v. Smith*, 232 F. 2d 570 (3d Cir. 1956).

The omission from the indictment has the unfortunate result of permitting the Government to attribute an extraordinarily broad and indefinite scope to the alleged activities

of O'Donnell. Worse, the district court in its charge, as will be made apparent subsequently, never did define to the jury the precise legal duties involved and to which the alleged bribed invited violation. Finally, in its opinion supporting the verdict, the district court ascribed duties to O'Donnell and to Golden specified neither in the indictment nor the charge.

As to both O'Donnell and Golden, the Government did not seek to establish or define their employment or their legal duties through their superiors, or through departmental or agency regulations or rules. *Cf. Schneider v. United States, supra*, 192 F. 2d at page 501.

As to Golden, it is abundantly clear that no legal duty rested upon him in connection with the painting project. He testified that his primary duties were assigned duties under "mason construction, storm drainage systems," and he said that he assumed the duties of assistant chief inspector in the *absence* of Mr. O'Donnell (41a). Since O'Donnell was present and acting, it must follow that Golden's duties remained confined to mason construction and storm drainage systems. Indeed, Golden had no knowledge of the painting job, because, as he said, "There was an inspector assigned to the painting operation" (45a).

As to O'Donnell's duties, it is submitted that the case rests upon his testimony alone, but it is impossible to discern at any point the legal duty which he had and which is involved herein. O'Donnell continually used the editorial "we" to refer to the Corps of Engineers, not to himself, and although it is perfectly plain that he did not legally have all of the duties and obligations of the Colonel in charge. It is also true that while O'Donnell testified about taking samples, in this connection he referred to "they" rather than "we" (24a). The "practice" as related by him, was that at the time of taking a sample, representatives were present from the Corps, the contractor and the painting subcontractor. It is abundantly clear, however, that it was the duty of the painting subcontractor to furnish the sample,

including the container (24a, 38a). According to O'Donnel, it is the contractor who is responsible for the paint sample that he "hands" the inspector, and the inspector is only there to see that the paint is taken out of an unopened can. Certainly it appears that "they"—again the Corps—had a "material inspector" there for this purpose (24a), but O'Donnell never said he was a material inspector. And while he testified that "we" did this or "they" did something else, it is clear that O'Donnell had never participated in taking a paint sample prior to the occasion alleged in the indictment (24a). And while he testified as to "practice", it is also plain that the Colonel varied the practice of permitting the defendant to submit samples, and to do so without the presence of the representative of the prime contractor and without the material inspector of the Corps.

It should be pointed out that according to both O'Donnel and Golden, the alleged bribe was offered to get them to "accept" the samples offered by the defendant. They were there, or one of them was there, to receive the sample. Nowhere does it appear that either had the right or duty to accept or reject any sample offered. If one or the other was to see whence the sample came, and did not, it may have been his duty to report that fact. There was no evidence that the alleged bribe was offered for the purpose of having either of them falsify any report which was to have been or could have been made.

The deficiencies of the evidence are demonstrated by the charge, later discussed, which completely omitted any mention of legal duties, but authorized the jury to find the defendant guilty if it found that he was inducing them to *approve* the paint. And in its opinion (76a), the district court interpreted the situation as one in which the defendant sought to have O'Donnell and Golden substitute the proffered samples for other samples previously taken; a matter wholly foreign to the record.

It is accordingly submitted that the motions in arrest of judgment and for judgment of acquittal should have been granted.

3. The Judge Committed Prejudicial Error in His Instructions to the Jury.

A. The Judge Removed From the Jury the Necessity of Finding Essential Elements of the Crime Charged.

(1) As the Judge correctly instructed the jury (53a-54a), the pertinent section of the statute and the indictment required that to find the defendant guilty the jury would have to find not only that defendant offered a bribe to employees acting on behalf of the United States, but that such an offer was made with intent to induce those officials to do acts in violation of their lawful duty.

Therefore, to sustain a conviction, it is essential not only that the evidence show, but also that the jury be instructed to determine, what was the lawful duty of such officials, and that the jury find that the bribe was aimed at inducing those officials to do acts in violation of that duty. It would be no violation of this indictment drawn under this portion of the statute to offer to bribe officials to induce them to do their lawful duty in a proper manner, or to do an act other than in their official capacity. 11 C. J. S., Bribery § 2e(1), p. 847. See *Woelfel v. United States*, 237 F. 2d 484 (4th Cir. 1956); *Boykin v. United States*, 11 F. 2d 484 (5th Cir. 1926). This indictment was *not* drawn under the portion of the statute making it a crime to offer money to an officer "with intent to influence his decision or action. . . ." *Cf. United States v. Labovitz*, 251 F. 2d 393, 394 (3d Cir. 1958).

Here, not only was there no competent evidence offered to show what were the respective duties of O'Donnell and Golden, but the jury was not instructed as to the necessity of first determining what their lawful duty consisted of, and then of finding that the bribe offered was intended to

induce a violation of that duty. The jury was not told to look at the contract or the specifications to delineate that duty, nor was it given any guidance as to where such duty could be found. In short, nothing was said about the necessity of defining duty, even though "the duties of him to whom the offer is made or the bribe given are most pertinent." *Schneider v. United States*, 192 F. 2d 498, 500 (9th Cir. 1951).

The district judge, in defining the phrase "promises, offers or gives," said:

> "Whereupon Mr. O'Donnell went to go to make the tests; apparently the defendant was dressed as described—that is for you: that they went over there instead of going to a particular place—to gallon cans—to make the test, the paint that was to be used on the job, the defendant then had three bottles of paint of some kind and wanted Mr. O'Donnell and Mr. Golden to use these three bottles of paint *instead of actually sampling and testing the paint that was to be used there on the job.* Said Mr. O'Donnell, that in those three bottles were the paints, as we understand it, of three different manufacturers, Allied, Bruder and apparently Central." (55a) (Emphasis supplied.)

And shortly thereafter, the court instructed:

> "Now then, the testimony is for you as to what actually occurred. It is your recollection that controls. The court's recollection, and by which you are not bound, is that there was some testimony that this defendant said to Mr. Golden that he had 250 bills, 125 of them for O'Donnell, 125 for him—for Golden—if he would accept the samples, the three bottles, *rather than to go to check the paint that is going to be used on the job.*" (56a) (Emphasis supplied.)

It should be noted that there was absolutely no evidence offered that the paint in the three bottles had not come from

the gallon cans, nor that the paint in the bottles did not come from paint that was actually to be used on the job. At any rate, the Judge never instructed the jury that *it was necessary for them to find that the paint in the bottles did not come from paint which would be used on the job*—this fact was merely assumed by him in the above instruction. Obviously, it was the jury's function to determine whether the witnesses were correct in their interpretation of their duty to take samples only from unopened cans, and, if so, it was necessary for the jury to find a violation of this duty before they could find defendant guilty. Yet they were not so instructed. On the other hand, if the inspectors were not lawfully obligated to see that samples were taken from unopened cans, then any offer to induce them to inspect samples in bottles not taken from unopened cans could not constitute a violation of the statute.

(2) Two additional essential elements must be found to sustain a conviction: that the bribe was offered to an employee of an agency of the United States, and that such employee was acting in an official capacity. In the case at bar, the Judge removed from the jury the function of finding those two facts. The Judge instructed:

> "The evidence is that Walter P. Golden was assistant chief under O'Donnell; the evidence is that O'Donnell was the chief inspector at that time; the evidence is that they were working for the Corps of Engineers; the evidence is that they were employees; the evidence is that they were working for an agency of the United States, and we say to you as a matter of law that the Army Corps of Engineers in the construction of a Signal Depot is an agency of the United States, 'in an official function'—and we say to you as a matter of law that that was an official function, 'by authority of said agency'—the evidence is that they were acting as employees." (57a)

Yet, as already noted, the evidence, consisting of Golden's own testimony, was that his primary duties were "assigned duties in mason construction, storm drainage systems. I only assume the duties of assistant chief inspector in the absence of O'Donnell" (41a). At the time the alleged bribe was offered, Mr. O'Donnell was not absent, and therefore, Golden had no legal duty to perform in this instance. At least the jury should have been instructed that it was essential under those facts for it to find that both inspectors were acting in an official function. They were never so instructed; the court usurped the jury function in that respect. Even if the facts were not in dispute, the court may not usurp the jury function but must properly instruct the jury and permit it to make its own finding; he cannot, in effect, direct a verdict of guilty even though no facts might have been in dispute. *United States v. Lang*, 239 F. 2d 676 (3d Cir. 1956); *United States v. Gollin*, 166 F. 2d 123 (3d Cir. 1948), *cert. denied*, 333 U. S. 875 (1948); and cases therein cited.

B. The Case Was Submitted to the Jury on the Wrong Theory.

The district judge compounded the error of failing to instruct as to the necessity of finding duty, when he charged as follows:

> "Before you can find the defendant guilty, you would have to find that he offered this money to these two and that he offered it with corrupt intent to have them not to do their work as their duty called for, but to do it his way and to have the paint approved *which may or may not have been proper paint.*" (57a-58a) (Emphasis supplied.)

The jury could find defendant guilty *only* if the paint being submitted was *not proper paint, i.e.*, if it was not intended to be used on the job. If it was proper paint that defendant was seeking to have submitted, then a bribe was

not being offered to induce an unlawful act and there was no violation of this statute. Under the above instruction, the jury was instructed that it could find defendant guilty even though it might find that the offer was intended to induce a lawful act. Accordingly, the conviction could not stand. *Stirone v. United States*, 361 U. S. 212 (1960).

C. The Instruction Was Hopelessly Confusing and Misstated Material Facts.

The testimony of Card was that the paint which had been used on the job had been certified by Central Paint Company (20a), but it was not clear from his testimony whether this was the only paint which was permissible under the contract or specifications. In fact, O'Donnell testified that Bruder paint had previously been used on the job (33a-34a). He also testified that the three bottles in the car consisted of Bruder, Central and Allied (28a). The record was completely devoid of any competent evidence showing which brand or brands of paint was proper, and which kind of paint was intended to be used on the job, and from which, therefore, the samples should have been taken. The district judge was apparently confused by the evidence on this point and, in submitting the issue to the jury, gave the following instruction:

> "Before you can find this defendant guilty, you would have to believe that these things occurred and that this defendant offered that money with the corrupt intent that he didn't want them to sample the paint that was in the gallon cans, but he wanted them to take the three samples of (63) paint which—one of which was not called for by the job at all and the others—that is for you." (57a)

It is respectfully submitted that this instruction not only misstated the evidence, but was completely incomprehensible and furnished no guidance to the jury as to the facts necessary upon which to sustain conviction.

The district judge further instructed as follows:

> "Whereupon Colonel Svoboda, who was then up there, talked to the defendant and ordered Mr. O'Donnell to go ahead and make other tests. Whereupon Mr. O'Donnell went to go to make tests; . . . ." (55a)

It was quite clear from the testimony that inspector O'Donnell could not make tests, and that Colonel Svoboda could not and did not instruct him to do so; all that was instructed was that he take new samples. According to O'Donnell's own testimony, those samples had to be submitted to the Philadelphia office, where they were then sent to a laboratory for tests (31a). This incorrect summary of the facts misled the jury and prejudiced the defendant.

D. The Court Failed to Instruct the Jury of the Necessity for Finding an Offer of Money.

All of the testimony relating to the offer allegedly made by Kemmel was that he offered "250 bills, 125 apiece". While it may have been a reasonable inference that the term "bills" used in this context meant "dollars," the drawing of that inference is *solely* a jury function. At no time was the jury instructed that it must find that by these words the defendant meant to convey an offer of money. Since the indictment drawn under this statute specifically charged defendant with offering *money* for the improper purposes set out in the indictment, it was essential that the jury find that the thing offered was money. The jury was not so instructed here. *United States v. Lang, supra; United States v. Gollin, supra.*

E. The Judge Improperly Defined the Term "Offer".

The statute under which this indictment was drawn declares to be guilty of an offense "whoever promises, offers or gives any money . . ." to the persons therein enu-

merated for the unlawful purposes therein set out. The indictment did not follow the statute exactly, but charged that Appellant "did offer money, to wit, $250.00, . . .". Therefore, it became essential for the judge to instruct the jury as to the difference between promising, offering and giving. See *Krogmann v. United States*, 225 F. 2d 220, 227 (6th Cir. 1955). The court used the terms interchangeably, and apparently permitted the jury to find defendant guilty if it should find any of the three types of conduct. The district judge instructed:

> "Now we are not going to with this jury attempt to be a writer of a dictionary and we are not going to get into semantics as to whether that was a promise or an offer, the charge here. The government says that is an offer—that is up to this jury—when you say to a man 'You can have $125.00 apiece if you will take these instead of making the tests' which your duty calls for you to make. He was assigned to make the tests.
>
> Did he offer them the $125.00 each? The government argues that he did. The defendant says that all he was doing then was negotiating.
>
> In that connection we call your attention to the other word 'gives'. Now then, if he actually gave the money, it would be giving the money.
>
> The statute covers all three. Did he promise it to him? Did he offer it to him? Did he give it to him? Here they say he offered. Unless you find that that amounts to an offer, they haven't proved their charge." (56a)

While the indictment was undoubtedly sufficient even though limited to only one of the three means of violating the statute, the instruction to the jury was broader than the indictment, and permitted the jury to find defendant guilty for acts not charged in the indictment, although

within the statute. Thus, the conviction cannot be sustained. *United States v. Stirone, supra. Compare United States v. Smith*, 232 F. 2d 570 (3d Cir. 1956).

The district judge, in his opinion refusing the motions, incorrectly concluded that there was no evidence of promise, but only of an offer (78a). Whether or not this is the case, the court should have defined the difference and permitted the jury to make the distinction.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Philadelphia 7, Pa.,
Attorney for Appellant.

APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,543

UNITED STATES OF AMERICA

v

JOHN B. KEMMEL,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued July 24, 1961

Before BIGGS, *Chief Judge*, and GOODRICH and HASTIE, *Circuit Judges*

Opinion of the Court

(Filed November 3, 1961)

PER CURIAM.

We have carefully examined the record and have considered the arguments of appellant's counsel. We can find no substantial prejudicial error in the proceeding. Consequently the judgment of conviction will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,543

UNITED STATES OF AMERICA

v

JOHN B. KEMMEL,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: BIGGS, *Chief Judge*, and GOODRICH and HASTIE, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States Court for the Middle District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF,
Clerk.

November 3, 1961

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,543

UNITED STATES OF AMERICA

v

JOHN B. KEMMEL,
Appellant.

Opinion Sur Petition for Rehearing

Present: BIGGS, *Chief Judge*, and GOODRICH, HASTIE, and GANEY, *Circuit Judges*.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By THE COURT:

BIGGS,
Chief Judge.

Dated: December 5, 1961

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 645

JOHN B. KEMMEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 72-78) is reported at 188 F. Supp. 736. The *per curiam* opinion of the court of appeals (Pet. App. A, p. 23) is reported at 295 F. 2d 712.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1961 (Pet. App. B, p. 24). A petition for rehearing was denied on December 5, 1961 (Pet. App. C, p. 25). The petition for a writ of certiorari was filed on January 3, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was deprived of a fair trial by the introduction of alleged hearsay and irrelevant evidence.

2. Whether the evidence was sufficient to prove that the government employees to whom petitioner offered a bribe were acting pursuant to their official duties.

3. Whether the court's charge to the jury was erroneous.

STATUTE INVOLVED

Section 201 of Title 18 U.S.C. provides in pertinent part as follows:

> Whoever promises, offers, or gives any money * * * to any * * * employee * * * acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency * * *, with intent * * * to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.

STATEMENT

Petitioner was charged in a one-count indictment in the United States District Court for the Middle District of Pennsylvania with offering a $250 bribe to two employees of the Army Corps of Engineers with intent to induce them to act in violation of their lawful duty (R. 3). The jury found him guilty (R. 64), and he was sentenced to imprisonment for a period of eighteen months (R. 68, 79). On appeal, the conviction was affirmed (Pet. App. B, p. 24).

Pertinent evidence adduced at the trial may be summarized as follows:

Petitioner was the president and principal stockholder of John B. Kemmel, Inc., which had a painting sub-contract with Merritt-Chapman & Scott Corporation, the prime contractor with the United States Army Corps of Engineers for the construction of the Signal Corps Depot at Tobyhanna, Pennsylvania (R. 5, 6, 8). Plans and specifications required that all paint delivered for use on the job was to be inspected by taking samples from previously unopened cans and submitting such samples to the Corps of Engineers for testing and approval (R. 9, 23, 31, 38). Upon completion of three tests petitioner was notified that the paint being used did not meet the required standards and that all painting should cease (R. 12, 13, 15, 33, 34, 35).

One O'Donnell, who was the chief inspector for the Corps of Engineers, supervised nine inspectors whose duties were to see that all work done at the Tobyhanna Signal Depot was according to plans and specifications (R. 22). Golden was O'Donnell's assistant chief inspector (R. 41). On July 30, 1954, after Colonel Svoboda, the Engineer officer under whom O'Donnell and Golden worked, authorized petitioner to submit new paint samples, the two inspectors met petitioner at the paint shop (R. 26–27, 29, 41–42). Petitioner offered Golden $250 for himself and O'Donnell if, instead of taking samples according to the prescribed procedure, they would permit petitioner to substitute paint samples he had in three bottles in his car. Petitioner said to Golden, "I have 250 bills

if you people will accept my samples. * * * Why go to the trouble of taking additional samples?" (R. 28, 42). When Golden stated that petitioner was attempting to bribe a government agent, petitioner remarked, "Well, you fellows didn't see any money" (R. 28–29, 42).

Petitioner offered no defense evidence and did not testify in his own behalf.

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 8–11) that he was deprived of a fair trial by reason of the introduction into evidence of prejudicial hearsay testimony. Certain evidence to which petitioner's counsel made only a general objection (R. 12, 35) was admitted as "verbal acts,"[1] *i.e.*, admissible not for the truth of the utterances but as part of the act described. Such utterances, which are admissible because they explain the conduct proved, are a recognized exception to the hearsay rule. See Wigmore, *Evidence* (3d ed.), § 1772. Inspector O'Donnell's report to Colonel Svoboda concerning the paint sampling (R. 35) and the notification by the Corps of Engineers to petitioner that the paint samples had been rejected (R. 12) explained why petitioner stopped further work on the contract and submitted new samples. Neither statement was of real importance in the case since petitioner did not contest the fact that his paint samples had been rejected.

[1] The court referred to them as "verbal facts" (R. 12, 35). Since petitioner's counsel did not ask for a definition of this phrase, it was not necessary that the court give a definition.

The challenged testimony of witness O'Donnell (R. 33–34) with respect to the rejection of the samples is equally insignificant. When asked what he did after he received a report that the first sample had failed, O'Donnell in a rambling account said that he was told to be present when the second group of samples was taken (R. 33). He then related an incident indicating that one "Sammy," petitioner's foreman, was trying to conceal the kind of paint he was using, that Colonel Svoboda told the contractor and the contractor shut down the job (R. 34). Upon completion of the testimony petitioner's counsel moved to strike it. Although the court offered to strike the evidence if defense counsel would "make the proper motion as to certain parts," counsel insisted that the court strike all the testimony. The court then properly ruled (R. 35):

> As to that motion, the motion is denied. As to the portion about Sammy running with the cans, we can see nothing to tie it up with this case, with this defendant, so that portion is stricken. But we are in a dilemma as to what defense counsel attempts to cover when it makes a sweeping motion when some is good and some is bad, we can't rule intelligently.

The court then said that it would admit only the evidence that the colonel stopped the painting (R. 35). The judge thus made clear the only part of the testimony which the jury was to consider.

2. Petitioner was convicted of violating 18 U.S.C. 201 which forbids bribes or offers of bribes to any employee "acting for or on behalf of the United

States, or any department or agency thereof, in any official function, under or by authority of any such department or agency * * *" (see *supra*, p. 2). The indictment alleged that, at the time of the bribe offer, O'Donnell and Golden were "employees acting for an agency of the United States, in an official function, by authority of such agency * * *" (R. 3). It was not necessary that the indictment spell out in detail the precise nature of the duties of the inspectors. This was properly a matter of proof at the trial.

Contrary to petitioner's contention (Pet. 11–13), the evidence was sufficient to show that O'Donnell and Golden were performing their official duties as employees of the Corps of Engineers at the time petitioner attempted to bribe them. O'Donnell and Golden, as part of their official duties as chief inspector and assistant chief inspector for the Corps of Engineers, were required to take paint samples from unopened cases at the Tobyhanna Depot to be sent to Philadelphia for laboratory testing (R. 22–24, 31, 38, 41). O'Donnell and Golden were obtaining new paint samples on direct orders from their superior, Colonel Svoboda, when the bribe offer was made (R. 41–42, 26–28).[2]

3. Petitioner's attack (Pet. 14–21) on portions of the court's charge is without merit. The charge cannot be read by lifting isolated phrases out of context, as petitioner does. When read in its entirety as it must be (*Boyd* v. *United States*, 271 U.S. 104, 107), it is clear that the charge was not erroneous.

[2] It is immaterial that Golden also had other duties relating to mason construction and storm drainage systems (R. 41).

In addition, we submit that petitioner failed to state "distinctly the matter to which he object[ed in the charge] and the grounds of his objection." Rule 30, F.R. Crim. P. It is true that petitioner submitted proposed instructions (R. 62–64) and that he objected when these instructions were not given verbatim (R. 47–50, 59–60). But as the trial judge stated (R. 50, 59–60), all the instructions were given in substance—at least with regard to the points petitioner raises in this Court. Petitioner merely excepted to these instructions without even generally specifying the grounds of his objections. He is therefore precluded from challenging the correctness of the charge on appeal.

a. The instructions required the jury to find the essential elements of the crime of offering a bribe. In order to convict, the jury was required to find that the two inspectors had a duty to take samples of paint from the gallon cans on the job (R. 57, 58) and that the bribe was offered with a "corrupt intent to have them not to do their work as their duty called for * * *" (R. 58; see R. 62). Although the court mentioned that the evidence indicated that the two inspectors were employees of the Corps of Engineers which was engaged in an official function in construction of the depot (R. 57), the court specifically required for conviction a finding that "the corrupt offer was made to one acting on behalf of an agency of the United States in an official function and that the offer was made to influence that person in doing some act or in the performance of some duty in his official capacity" (R. 59).

b. Petitioner claims (Pet. 17–18) that the case was submitted to the jury on the erroneous theory that petitioner could be guilty even if he was attempting to induce a lawful act since it allowed the jury to convict whether the paint in fact met the requirements or not (R. 57–58). This instruction, however, was clearly correct; the crucial issue under 18 U.S.C. 201 is whether petitioner offered the money with corrupt intent to have the inspectors not do their duty. If the inspectors had failed to take proper samples as petitioner was attempting to induce them to do, they would have violated their duty whether or not proper samples would have satisfied the later tests.[3]

c. The instructions were not confusing. While the court did not state in describing the evidence the brand names of the paint which was sampled nor require the jury to make a finding on this point (see R. 57), the brand names were irrelevant to any real issue. The charge properly authorized a verdict of guilty upon a finding that petitioner offered the money with the corrupt intent of inducing the inspectors not to sample the paint in the gallon cans in accordance

[3] The belated suggestion (Pet. 15–16) that the paint in the three bottles, which petitioner wanted the two inspectors to take as new samples, might have come from the gallon cans being used on the job, is not supported by any evidence. If that had been the case, petitioner undoubtedly would have so informed the inspectors and there would have been no need to offer a bribe. In the absence of any such evidence in the record, there was no reason for the court to charge the jury that in order to convict it must find that the paint in the bottles did not come from the paint to be used on the job—particularly since petitioner did not ask for this instruction.

with their duty, but to take the three samples from the bottles in petitioner's car.

The trial judge was mistaken when, in giving his recollection of the evidence, he said that Colonel Svoboda ordered O'Donnell to make other tests (R. 55), since O'Lonnell was actually told only to take samples. This does not alter the basic issue whether petitioner offered a bribe to the inspectors not to perform their duty. Moreover, the court was careful to state in other parts of the charge that the jurors alone were the sole judges of the facts (R. 51) and that their recollection of the testimony, not the court's, was controlling (R. 56).

d. The court did not fail to instruct the jury on the necessity for finding an offer of money. On the contrary, the charge specifically and repeatedly required a finding of the offering of "money" for a verdict of guilty (R. 56, 57, 61–62).

e. The charge was not broader than the indictment because it permitted the jury to find either an offer, a promise, or a gift of bribe money, while the indictment charged only an offer. Even though the court made cursory reference to all three acts as covered by the statute (R. 56), nowhere was the jury told that it could return a guilty verdict on the basis of a promise or gift. The court pointed out that the government was relying upon an offer and that "[u]nless you find that [petitioner's action] amounts to an offer, they haven't proved their charge" (R. 56). When the court specified the facts necessary for a finding of guilty, it spoke only of an offer of a bribe—not of a promise or gift (R. 57, 59).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1962.

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